No. 85-1517

# IN THE
# Supreme Court of the United States

OCTOBER TERM, 1986

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THE STATE OF COLORADO

*Petitioner,*

v.

JOHN LEROY SPRING

*Respondent.*

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**On Writ Of Certiorari To The Supreme Court of Colorado**

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## RESPONDENT'S BRIEF

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## QUESTIONS PRESENTED FOR REVIEW

1. Whether the Colorado Supreme Court, applying the *totality of the circumstances* standard, correctly concluded that Mr. Spring's *Miranda* waiver was not knowing and intelligent?

2. Whether the Colorado Supreme Court, applying the *totality of the circumstances* standard, correctly concluded that Mr. Spring's *Miranda* waiver was not voluntary?

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## STATEMENT OF THE FACTS

1. Early in the month of February, 1979, the Respondent John Spring, his wife Becky Spring and Donald Walker were staying at the home of Donald Wagner in Craig, Colorado. (Tr. 3225-26, 3293)[1] On or about the second or third of February, John Spring and Donald Wagner went hunting and bagged a deer. (Tr. 3286-87) After they returned and told Donald Walker about it, Walker was included in their plans for going the next night to try for an elk. (Tr. 3291)

The following evening, John Spring, Donald Wagner and Donald Walker drove to the vicinity of an abandoned mine. (Tr. 3304) Mr. Spring was carrying a .25 automatic pistol, Wagner had a rifle and a .45 automatic pistol, and Walker had a .22 automatic pistol. (Tr. 3306) Wagner instructed Walker to go into the ravine and choose an elk. Walker indicated he would need a rifle, and Wagner told him to choose an elk and then motion to Wagner so that Wagner could shoot the elk. (Tr. 3315) Wagner asked Mr. Spring to shine the flashlight he was carrying into the ravine. Wagner then told Mr. Spring to move the light toward Walker. When Mr. Spring did so, he heard a shot and saw Walker fall. (Tr. 3318) Wagner then shot Walker again. Wagner told Spring to help him drag Walker into the ditch. Mr. Spring testified at trial that he was afraid Wagner would kill him next so he complied. (Tr. 3321) The men then put Walker in the ditch and kicked snow over him. (Tr. 3323)[2]

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[1] "Tr." refers to the folio numbers in the trial transcript. "Supp. Tr." refers to the transcript of the suppression hearing. "JA" refers to the Joint Appendix previously filed with this Court.

[2] At trial the prosecution introduced evidence that in 1976 and 1977 Mr. Spring had told a friend, Robert Beam, that he was planning to kill Walker because he was a "snitch." (Tr. 2904) Mr. Beam admitted

2. In February of 1979, George Dennison of Kansas City, Missouri, was recruited as an informant by Harold Wactor, a law enforcement officer of the Bureau of Alcohol, Tobacco and Firearms (ATF) of the United States Department of Treasury. (JA, p4) Mr. Dennison informed Agent Wactor that Mr. Spring was involved in a scheme to steal firearms, transport them interstate and sell them. (JA, p4) Mr. Dennison also informed Agent Wactor that Mr. Spring had admitted being involved in the homicide of Donald Walker. (JA, p25) On March 23, 1979, Mr. Dennison set up a telephone conversation with Mr. Spring which was tape recorded by ATF agents and during which Mr. Spring implicated himself in the Walker murder. (Tr. 2747-48)

Dennison subsequently arranged a meeting between Mr. Spring and ATF agents in Kansas City. On March 30, 1979, Mr. Spring was arrested during an actual hand to hand sale of stolen firearms to undercover federal agents. (JA, p8) Mr. Spring was in possesion of a .22 caliber pistol at the time of his arrest. (JA, p10)

After the arrest on March 30, Mr. Spring was advised of his rights by ATF agent John Malooly. (JA, p11) Mr. Spring was then transported to the ATF office where he was advised of his rights by Agents Sadowski and Patterson. (JA, p13, 47) Mr. Spring executed a written waiver

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to roughly thirty prior felony convictions (Tr. 2905) and at trial Mr. Spring testified that he had resolved his conflicts with Mr. Walker long before the shooting. (Tr. 3231-55) Mr. Spring testified at trial that he was not aware of Wagner's plan to kill Walker and that he aided Wagner after the murder because of his fear that Wagner would kill him as well. (Tr. 3036-37) Mr. Spring's testimony was impeached by a statement made to Colorado investigators on May 26, 1979, that Mr. Spring had known or had had an idea that Walker would be killed that night. (Tr. 3036-37)



and agreed to answer the agents' questions. (JA, p49) At no time prior to executing the waiver was Mr. Spring advised that he was a suspect in the murder of Donald Walker. (JA, p49) Agents Patterson and Sadowski first questioned Mr. Spring about the weapons charges. Agent Patterson then asked Mr. Spring whether he had a criminal record. Mr. Spring stated that he had a juvenile record involving the shooting of his aunt when he was age ten. (JA, p49) Agent Patterson then asked Mr. Spring whether he had ever shot anybody else. According to Patterson, Mr. Spring "kind of ducked his head and mumbled 'I shot another guy once'." (JA, p50) Agent Patterson then asked Mr. Spring whether he had ever been to Colorado. Mr. Spring stated that he had not. (JA, p50) Agent Patterson then asked Mr. Spring whether he had shot a man named Walker west of Denver and thrown his body into a snowdrift. Agent Patterson testified that "there was a long pause, then [Mr. Spring] kind of ducked his head and said 'no'." (JA, p50)

Donald Walker's body was discovered by Colorado authorities on April 15, 1979. (Tr 2249-52) On May 26, 1979, Colorado law enforcement officers Curtis and Konkel interviewed Mr. Spring who was then in custody in the Jackson County Jail in Kansas City, Missouri. (Supp. Tr. 239-44) The purpose of the interview was to get information about the death of Donald Walker. (Supp. Tr. 242, 310) At the suppression hearing, Detective Curtis stated that he and Konkel had been informed of the results of the March 30th interrogation of Mr. Spring by ATF agents. (Supp. Tr. 283-84) Agent Konkel testified that he told Mr. Spring that he was a suspect in the Walker homicide and had told him what they had learned about the case from ATF investigators. (Supp. Tr. 310) Mr. Spring was advised of his rights and agreed to talk. Dur-

ing questioning, Mr. Spring made oral and written statements that he was present during the elk hunt with Wagner and Walker, and that he held the flashlight while Wagner shot Walker and that he aided Wagner in disposing of the body. (Supp. Tr. 245-310)[3]

[3] On July 13, 1979, following Mr. Spring's guilty plea to the federal firearms offenses and the filing of an information charging him in the Colorado homicide, ATF Agents Wactor and Patterson again interviewed Mr. Spring for the stated purpose of obtaining information concerning the whereabouts of additional firearms and explosives. (JA, p68) The agents advised Mr. Spring of his rights. Mr. Spring acknowledged his rights but declined to sign any form without consulting an attorney. (JA, p68) No effort was made to contact Mr. Spring's lawyer. (Supp.Tr. 146-47) When Mr. Spring agreed to talk, despite his indication that he would not sign a waiver of his rights, the agents began by questioning Mr. Spring about weapons, and then, as on March 30, shifted their questioning to the Walker homicide. Several times during the questioning Mr. Spring responded to questions about Walker's death by saying, "I'd rather not talk about that." (Supp.Tr. 2320-35) When this occurred, the agents returned to the more general questioning, about camping out in caves in Iowa, or some other topic, before asking more questions about the homicide. (Supp.Tr. 233-37) Eventually Mr. Spring admitted that he had been in Colorado with Walker at the time of the shooting and that the gun in his possession at the time of his arrest had belonged to Walker. The agents also got Mr. Spring to agree that "[he], Wagner and Walker went out together and that only [he] and Wagner came back alive." (JA, p19)

The trial court found the July 13th statements admissible but the Colorado Court of Appeals reversed, holding that Mr. Spring had exercised his right to remain silent with regard to the Colorado homicide. *People* v. *Spring*, 671 P.2d 965, 967 (Colo.App. 1983). The Court of Appeals also held that Spring was entitled to renewed *Miranda* warnings when the agents began to question him about the murder, which was a topic not related to the stated purpose of the interview. The Colorado Supreme Court affirmed the ruling of the Court of Appeals but rejected much of that Court's reasoning. The Court first disapproved of the Court of Appeals' adoption of a *per se* rule rendering invalid any waiver of *Miranda* rights when a defendant answers questions, without a renewed *Miranda* advisement, on a subject about which he was not informed before the interrogation. *People* v. *Spring*, 713 P.2d 865, 877 (Colo. 1985) (*See* discussion of the Colorado Supreme Court's holding, at text accompanying n.5, *infra*) The Court held, however, that the July 13th statement must be suppressed because there was no evidence that the "ATF agents made any effort to reaffirm Spring's decision to waive his constitutional rights after he declined to answer questions [regarding the Walker homicide]." *Id.*, 713 P.2d at 878.



Prior to trial, Mr. Spring moved to suppress the statements made to law enforcement officers on the ground that he had not effectively waived his *Miranda* rights. After a hearing held on March 17, 1980, the trial court denied the motion. Despite the fact that Mr. Spring was unaware that the ATF agents intended to question him about the Walker homicide, the court held that Mr. Spring's *Miranda* waiver of March 30, 1979, was made freely, knowingly and intelligently.[4] The court also held that the statements of May 26th followed a proper advisement and waiver of rights pursuant to *Miranda* and were therefore admissible. (JA, p68) Mr. Spring was subsequently convicted at trial of first-degree murder.

In its Opening Brief, the State of Colorado asks this Court to address the issue of the admissibility of the July 13, 1979, statement. Brief of the State of Colorado, at 7 n.4. As the United States Government notes in its brief, however, "[t]his Court limited its grant of certiorari to the first question presented in the petition, and thereby expressly declined to review the state court's determination with respect to this issue. Accordingly, no question regarding the admissibility of the July 13 statement is presented in this case." Brief of the United States, at 4 n.3.

[4] The trial court sustained Mr. Spring's relevancy objection to Mr. Spring's statement "I shot another guy once" and the prosecution chose not to introduce the remainder of the March 30th statement at trial.

3. The Colorado Court of Appeals reversed, holding that Mr. Spring's statements had been admitted in violation of this Court's decision in *Miranda* v. *Arizona*, 384 U.S. 436 (1966). *People* v. *Spring*, 671 P.2d 965, 996-97 (Colo.App. 1983). In reaching its decision the Court of Appeals adopted a *per se* rule rendering invalid any waiver of *Miranda* rights when a defendant answers questions, without a renewed *Miranda* advisement, on a subject about which he was not informed before the interrogation:

> The [ATF] agents had a duty to inform Spring that he was a suspect, or to readvise him of his *Miranda* rights, before questioning him about the murder. . . . Because the agents failed to so advise, any waiver of rights in regard to questions designed to elicit information about Walker's death was not given knowingly and intelligently.

*Id.*, 671 P.2d at 966-67. The Court thus concluded that Mr. Spring's statements of March 30th were inadmissible.

The Court also held that the May 26th statement was inadmissible as "fruit of the poisonous tree" of the March 30th statement. The Court concluded that the May 26th statement had to be suppressed because the prosecution had failed to meet its burden of showing that the statement was not the product of Mr. Spring's statement of March 30th. *Id.*, 671 P.2d at 967.

4. The Colorado Supreme Court affirmed but adopted a different analysis from that employed by the Court of Appeals. The Court noted that "the validity of Spring's *[Miranda]* waiver must be determined upon an examination of the *totality of the circumstances* surrounding the making of the statement to determine if the waiver was voluntary, knowing and intelligent. . . . No one factor is always determinative in that analysis. Whether, and to



what extent, a suspect has been informed or is aware of the subject matter of the interrogation prior to its commencement is simply one factor in the court's evaluation of the total circumstances. . . ." *People* v. *Spring*, 713 P.2d 865, 872-73 (Colo. 1985). (emphasis added) The Court went on to reject the absolute rule proposed by the Court of Appeals:

> We believe it to be more consistent with standards governing the validity of a waiver to consider the extent of the suspect's understanding of the subject matter, and the source of that understanding, simply as factors in the totality of circumstances surrounding the making of a statement. We decline to elevate those considerations into an absolute rule that renders any waiver automatically invalid when the interrogated suspect has not been informed of the subject matter of the questioning prior to its commencement.

*Id.*, 713 P.2d at 874. The Court went on to note that there was no basis to conclude that at the time of the waiver, Mr. Spring could reasonably have expected that the interrogation would extend to the subject of the Colorado homicide. The Court also noted that the record offered little with regard to Mr. Spring's intelligence or acquaintance with the criminal justice system. The Court concluded that "[g]iven these facts it cannot be said that Spring made a voluntary, knowing and intelligent decision to forego counsel and to answer questions concerning the murder." *Id.*[5]

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[5] The Colorado Supreme Court instructed the trial court on remand to determine whether the May 26th statement was the direct fruit of the inadmissible March 30th statement and to hold a hearing on attenuation if necessary. The Court also noted that the prosecution was free to argue the applicability of this Court's decision in *Oregon* v. *Elstad*, 470 U.S. ____, 105 S.Ct. 1285 (1985), to the issue of the admissibility of the May 26th statement. *Spring*, 713 P.2d at 876.

## SUMMARY OF THE ARGUMENT

1. In *Miranda* v. *Arizona*, 384 U.S. 436 (1966), this Court concluded that the process of in-custody interrogation of persons accused of crime contains inherently compelling pressures which work to undermine the ability of an individual to exercise the rights to remain silent and to counsel. This Court established concrete constitutional guidelines for law enforcement agencies and courts to follow in applying the privilege against self-incrimination. *Miranda* thus required certain specified warnings to be given persons questioned in custody as a prerequisite to the admissibility of statements obtained thereby.

In *Miranda*, this Court acknowledged that a defendant could waive the rights to counsel and to remain silent. Such a waiver must be knowing, intelligent and voluntary and must be made with an understanding of the consequences of waiving the rights. In deciding whether there has been a valid waiver of rights, the totality of the circumstances surrounding the waiver must be assessed. Under the totality of the circumstances standard, the background, conduct and experience of the accused must be evaluated together with the circumstances of the interrogation. Each of these factors, in company with all the surrounding circumstances, is relevant.

In the instant case the Colorado Supreme Court held that one factor to be assessed under the totality approach is the extent to which the defendant is aware of the subject matter of the interrogation prior to its commencement. *People* v. *Spring*, 713 P.2d 865 (Colo. 1985). The decision of the Colorado Supreme Court is correct. A knowing and intelligent decision to waive one's Fifth Amendment rights does not occur in a vacuum. Such a decision is inextricably interwoven with a particular set of facts involving a particular offense. Certainly it stands to



reason that defendant may not be able to knowingly and intelligently make the decision as to whether he wants counsel and to exercise his privilege against self-incrimination if he is unaware of the crime for which he is to be interrogated.

The decision of the Colorado Supreme Court is supported by this Court's decisions in *Fare* v. *Michael C.*, 442 U.S. 707 (1979) and *United States* v. *Washington*, 431 U.S. 181 (1977). In addition, the majority of lower courts that have considered the question have concluded that a suspect's knowledge of the subject matter of the interrogation is a relevant factor under the totality of the circumstances.

The Colorado Supreme Court assessed the totality of circumstances surrounding Mr. Spring's *Miranda* waiver and concluded that it was not knowing and intelligent. The Court noted that Mr. Spring was not advised that he would be questioned about a homicide and that he had no reason to suspect that the federal agents who had just arrested him in Kansas City during a firearms transaction would question him about a murder in Colorado. Moreover, the federal crime which occasioned the interrogation and *Miranda* waiver represented a relatively less serious matter than first-degree murder. The Court noted that the record offered little with regard to Mr. Spring's intelligence or experience with the criminal justice system. The foregoing reveals a careful and thorough analysis of the totality of the circumstances as is required by this Court's prior holdings and the decision of the Colorado Supreme Court should therefore be affirmed.

2. In *Miranda*, this Court held that in order for a suspect's statements to be admissible, the prosecution must show that the suspect voluntarily waived his rights.

This Court condemned any waiver obtained as a result of coercion and also held that "any evidence that the accused was threatened, tricked or cajoled into a waiver will . . . show that the defendant did not voluntarily waive his privilege." 384 U.S. at 476. As with the determination of whether a suspect knowingly and intelligently waived his rights, the voluntariness of a waiver must be assessed by an inquiry into the totality of the circumstances surrounding the interrogation.

In *Miranda*, this Court disapproved of the use of deceptive police practices in obtaining a suspect's confession. This Court condemned a procedure by which police offer suspects 'legal excuses,' thus suggesting that no crime was involved or that the suspect's role in the offense was mitigated. 384 U.S. at 451. This Court also condemned a procedure by which a suspect is identified by persons falsely claiming to have witnessed a crime, thus leading the suspect to misjudge the amount of evidence available to convict. 384 U.S. at 453. This Court's decision implies that police practices which mislead the defendant regarding the seriousness of his factual and legal predicament will vitiate the voluntariness of his *Miranda* waiver and render his subsequent statements inadmissible.

In the instant case the Colorado Supreme Court concluded that during the March 30th interrogation, ATF agents led Mr. Spring to believe that he would be questioned about one crime—the federal firearms offense—but then questioned him about a totally unrelated offense—the Walker homicide. At the time of the interrogation, ATF agents knew that Mr. Spring had confessed his involvement in the Walker homicide to George Dennison. The same agents had participated in tape recording a conversation between Spring and Dennison in which Spring implicated himself in the murder. The



agents then structured their interrogation as to not alert Mr. Spring as to the nature of the offense under investigation. This procedure was clearly intended to mislead Mr. Spring about his true factual and legal predicament in violation of this Court's decision in *Miranda*. Accordingly the Colorado Supreme Court concluded that under the measure of the "totality of the circumstances" Mr. Spring's *Miranda* waiver was not voluntary. That Court's decision, supported by the facts as adduced at the suppression hearing of March 17, 1980, should be affirmed.

## ARGUMENT

### I. THE COLORADO SUPREME COURT, APPLYING THE *TOTALITY OF THE CIRCUMSTANCES* STANDARD, CORRECTLY CONCLUDED THAT MR. SPRING'S *MIRANDA* WAIVER WAS NOT KNOWING AND INTELLIGENT.

In *Miranda* v. *Arizona*, 384 U.S. 436 (1966), this Court concluded that "without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." *Id.*, 384 U.S. at 467. In order to protect the individual's privilege against self-incrimination[6] this Court established "concrete constitutional guidelines for law enforcement agencies and courts to follow." *Id.*, 384 U.S. at 441-42. This Court thus held that prior to questioning, a suspect must be advised "that he has the right

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[6] The Fifth Amendment of the United States Constitution provides in pertinent part that:

> No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law.

to remain silent, that any statement he does make may be used in evidence against him, and that he has the right to the presence of an attorney, either retained or appointed." *Id.*, 384 U.S. at 444.

Like the warnings, a suspect's waiver of his rights is indispensable to the admissibility of the suspect's statements. This Court held that any waiver of rights must be "knowing, intelligent and voluntary," *Id.*, 384 U.S. at 444, and must be made with an understanding of the consequences of waiving the rights. "It is only through an awareness of these consequences that there can be any real understanding and intelligent exercise of the privilege." *Id.*, 384 U.S. at 469.[7]

In deciding whether there has been a valid waiver of rights pursuant to *Miranda*, this Court has held that the totality of the circumstances surrounding the waiver must be assessed including "the particular facts [of the] case, including the background, experience and conduct of the accused." *North Carolina* v. *Butler*, 441 U.S. 369 (1979).[8] *See also Moran* v. *Burbine*, ___ U.S. ___, 106

[7] In *Miranda*, this Court adopted as a standard for waiver the rule enunciated in *Johnson* v. *Zerbst*, 304 U.S. 458 (1938), that what must be shown is "an intentional relinquishment or abandonment of a known right . . . every reasonable presumption must be indulged against waiver. . . ." *See also Carnley* v. *Cochran*, 369 U.S. 506 (1962).

[8] In adopting the totality of the circumstances test to determine the validity of a *Miranda* waiver, this Court applied a test traditionally discussed in the context of determining the voluntariness of confessions under the Fourteenth Amendment Due Process Clause. *See Procunier* v. *Atchley*, 400 U.S. 446 (1971); *Schneckloth* v. *Bustamonte*, 412 U.S. 218 (1973); *Frazier* v. *Cupp*, 394 U.S. 731 (1969); *Greenwald* v. *Wisconsin*, 390 U.S. 519 (1968); *Beecher* v. *Alabama*, 389 U.S. 35 (1967); *Davis* v. *North Carolina*, 384 U.S. 737 (1966); *Haynes* v. *Washington*, 373 U.S. 503 (1963); *Lynum* v. *Illinois*, 372



S.Ct. 1135 (1986) (the "totality of the circumstances" must reveal "the requisite level of comprehension"); *Edwards* v. *Arizona*, 451 U.S. 477 (1981) (waiver depends "upon the particular facts and circumstances surrounding the case"); *Fare* v. *Michael C.*, 442 U.S. 707 (1979) (trial court as the "finder of fact" must look at the circumstances surrounding the interrogation.) Moreover, the inquiry under the totality approach is not limited, rather "it mandates inquiry into all the circumstances surrounding the interrogation." *Id.*, 442 U.S. at 725. "Each of the factors, in company with all of the surrounding circumstances . . . is relevant . . ." *Culombe* v. *Connecticut*, 367 U.S. 568, 602 (1961) (discussing the totality of the circumstances standard in the context of determining the voluntariness of a confession under the Due Process Clause).

In the instant case, the Colorado Supreme Court held that one factor to be assessed under the totality of the circumstances standard is the extent to which "a suspect has been informed or is aware of the subject matter of the interrogation prior to its commencement . . ." *Spring*, 713 P.2d at 873. "[This] awareness may come from many sources, not only from a direct and explicit statement by the interrogating officers, and the awareness can vary from a specific knowledge upon which the questioning will focus to a general understanding of the subject matter in which the interrogators are interested." *Id.*, 713 P.2d at 874.[9]

U.S. 528 (1963); *Spano* v. *New York*, 360 U.S. 315 (1959); *Fikes* v. *Alabama*, 352 U.S. 191 (1957); *Gallegos* v. *Nebraska*, 342 U.S. 55 (1951); *Haley* v. *Ohio*, 332 U.S. 596 (1948).

[9] In its brief the Government states that the Colorado Supreme Court adopted a rule which requires that a suspect be "informed in advance of all the subjects that would be covered in the proposed interrogation." Brief of the United States at 13. This statement

The decision of the Colorado Supreme Court is correct. Contrary to the position advanced by the Government in its brief, *see* Brief of the United States at p14, it is clear that a waiver of constitutional rights does not occur in a vacuum. Rather, a knowing and intelligent decision to waive one's Fifth Amendment rights is inextricably interwoven with a particular set of facts involving a particular offense. As this Court noted in *Miranda*, the warnings are "simply . . . the threshold requirement for an intelligent decision as to [their] exercise." 384 U.S. at 468. *See also Fare* v. *Michael C.*, "[T]he question whether the accused waived his rights '*is not one of form*, but rather whether the defendant in fact knowingly, intelligently and voluntarily waived the rights delineated in the *Miranda* case'." 442 U.S. at 724 (citing *North Carolina* v. *Butler*, 441 U.S. at 373) (emphasis added). Certainly it stands to reason that a suspect may not be able to knowingly and intelligently decide whether he wants counsel and whether to exercise his privilege against self-incrimination if he is unaware of the crime for which he is to be interrogated. Knowledge of the offense under investigation is essential "to the free exercise of the right to counsel and [right to remain silent]." *See United States* v. *McCrary*, 643 F.2d 323, 329 at n.9 (5th Cir. 1981) (quoting *Schenk* v. *Ellsworth*, 293 F.Supp. 26, 29 (D.Mont. 1968)). Thus, this Court has similarly held that a suspect's competence, *Tague* v. *Louisiana*, 444 U.S. 469 (1980), youthfulness, intelligence, and prior experience with the police, *Fare* v. *Michael C.*, 442 U.S. at 725-27, are all relevant factors not only in assessing, under the totality approach, whether a defendant has the capacity to understand the warnings given him and the nature of his Fifth Amendment rights, but also whether he comprehends the consequences of waiver.

misrepresents the holding of the Colorado Supreme Court, as the opinion in *Spring* and subsequent decisions of the Court have demonstrated. *See e.g.*, *People* v. *Jones*, 711 P.2d 1220 (Colo. 1986) (Defendant knowingly and intelligently waived his *Miranda* rights with regard to a homicide where he was taken into custody on an auto theft, and although he was not specifically advised that he was a homicide suspect, the auto was owned by the murder victim and the defendant "could have reasonably expected to be asked about the circumstances surrounding his ownership and possession of the car.") It is therefore clear that in *Spring*, the Colorado Supreme Court held only that the suspect's awareness of the subject matter of the interrogation is one factor to be assessed under the totality approach and that such an awareness can come from sources other than law enforcement officials.



The Colorado Supreme Court's holding is also supported by this Court's decision in *United States* v. *Washington*, 431 U.S. 181 (1977). In *Washington*, the defendant, in a noncustodial setting,[10] received the *Miranda* warnings prior to testifying before a grand jury. The defendant argued that he should also have been advised that he was a potential defendant. In rejecting the defendant's claim that additional warnings were required, this Court discussed the fact that at the time he received the *Miranda* warnings the defendant was aware that the was a suspect in the offense under investigation. This Court's opinion suggests that such awareness may be a relevant factor in the ability of a particular defendant to knowingly and intelligently exercise his rights:

> [The] events here clearly put respondent on notice that he was a suspect in the motorcycle theft. He knew that the grand jury was investigating the theft

[10] The Court noted in *Washington* that it was unclear—given, presumably, the noncustodial nature of the proceedings—whether the *Miranda* warnings were in fact required. 431 U.S. at 182.

> and that his involvement was known to the authorities. Respondent was made abundantly aware that his . . . version of the events had been disbelieved by the police officer, and that his friends . . . were to be prosecuted for theft. . . . In sum, by the time he [received the *Miranda* warnings and] testified respondent knew better than anyone else of his potential defendant status.

*Id.*, 431 U.S. at 181-82.

In *Fare* v. *Michael C.*, 442 U.S. at 707, this Court considered the respondent's awareness of the nature of the offense in affirming the validity of his *Miranda* waiver. In holding that the respondent had validly waived his *Miranda* rights this Court noted the respondent's extensive experience with the juvenile justice system and the fact that the *respondent was aware he was being questioned in connection with a murder. Id.*, 442 U.S. at 726.[11]

Similarly, the vast majority of lower courts that have considered the question have concluded that a suspect's knowledge of the subject of the interrogation is a relevant factor under the totality of the circumstances. *See e.g., United States* v. *Burger, 728 F.2d 140 (2nd Cir. 1984); Carter* v. *Garrison*, 656 F.2d 68 (4th Cir. 1981); *United States* v. *McCrary, supra; United States* v. *Dickerson*,

[11] *Cf. Estelle* v. *Smith*, 451 U.S. 454 (1981). In *Estelle*, this Court held that a defendant may not be compelled to respond to a psychiatrist if his statement can be used against him at a capital sentencing proceeding. The defendant in *Estelle* had not been advised of his *Miranda* rights. This Court also noted that the defendant was unaware of the "possible use of his [statement]" in the penalty phase. 451 U.S. at 468. This Court's opinion indicates that an awareness of this particular consequence may be a relevant factor in the ability of a particular defendant to make a knowing and intelligent decision to exercise his rights.



413 F.2d 1111 (7th Cir. 1969); *United States* v. *Gomez*, 495 F.Supp. 992 (S.D.N.Y. 1979); *Schenk* v. *Ellsworth, supra; Lane* v. *State*, 247 Ga. 19, 273 S.E.2d 397 (1981); *Armour* v. *State*, 479 N.E.2d 1294 (Ind. 1985); *Edwards* v. *State*, 227 Kan. 723, 608 P.2d 1006 (1980); *State* v. *Tribou*, 488 A.2d 472 (Me. 1985); *Commonwealth* v. *Madeiros*, 377 Mass. 319, 479 N.E.2d 1371 (1975); *State* v. *Beckman*, 354 N.W.2d 432 (Minn. 1984); *State* v. *Jones*, 484 A.2d 553 (N.H. 1984); *State* v. *Moore*, 34 Or.App. 649, 579 P.2d 320 (1978); *Commonwealth* v. *Brown*, 341 Pa.Super 138, 491 A.2d 189 (1985); *State* v. *Goff*, 289 S.E.2d 473 (W.Va. 1982)[12]

In its brief, the Government contends that this Court's decisions in *Moran* v. *Burbine*, 106 S.Ct. 1135, and *Oregon* v. *Elstad*, 470 U.S. ___, 105 S.Ct. 1285 (1985), compel the rejection of the Colorado Supreme Court's decision that a suspect's awareness of the offense under investigation is a relevant factor under the totality approach in determining the validity of his *Miranda* waiver. Brief of the United States at 17-18. This assertion is erroneous. In *Moran*, this Court held that the failure of law enforcement officials to inform the defendant of an attorney's phone call did not deprive him of information essential to his ability to knowingly waive his right to the

[12] In its brief, the State of Colorado cites a number of lower court decisions holding that law enforcement officials are not required to supplement the *Miranda* warnings with an advisement as to the nature of the offense under investigation. Brief of the State of Colorado at 15 n.5. Only three of the cases cited which address the issue, however, can be read as stating that an awareness of the offense under investigation is not a relevant factor under the totality approach. *See People* v. *MacDonald*, 61 A.D.2d 1081, 403 N.Y.S.2d 337 (1978); *People* v. *Pereira*, 309 N.Y.S.2d 901, 26 N.Y.2d 265, 258 N.E.2d 194 (1970); *State* v. *Woods*, 117 Wis.2d 701, 345 N.W.2d 457 (1984).

presence of counsel. In *Moran*, however, the defendant was fully informed of his right to counsel and his right to remain silent by law enforcement officials and information regarding the phone call could have no bearing on his ability to intelligently and "knowingly relinquish [his] constitutional right[s]." *Moran*, 106 S.Ct. at 1142. The respondent in *Moran*, "[comprehended] . . . the full panoply of the rights set out in the *Miranda* warnings and of the potential consequences of a decision to relinquish them." *Id.*, 106 S.Ct. at 1141. By contrast, Mr. Spring's lack of awareness about the nature of the offense under investigation critically impaired his ability to comprehend the consequences of waiver and make a knowing and intelligent decision to relinquish his rights.

In *Oregon* v. *Elstad*, 105 S.Ct. 1285, this Court rejected the defendant's claim that his *Miranda* waiver was not fully informed because he had not received an additional warning telling him that his previous confession was inadmissible. In *Elstad*, however, this Court noted that "[i]n many cases, a breach of *Miranda* procedures may not be identified as such until long after full *Miranda* warnings are administered and a valid confession is obtained. . . . Police officers are ill equipped to pinch-hit for counsel, construing the murky and difficult questions of when "custody" begins or whether a given unwarned statement will ultimately be held inadmissible." *Id.*, 105 S.Ct. at 1297. It must first be noted that nothing in the Colorado Supreme Court's decision imposes a duty on law enforcement officials to provide additional admonitions beyond those required by *Miranda* to a potential defendant. (*See* the discussion of the Colorado Supreme Court's holding at text accompanying n.5, *supra*). Moreover, in contrast to this Court's decision in *Elstad*, if the ATF agents in the instant case wished to assure that Mr. Spring's lack of



awareness would not be assessed as a critical factor under the totality standard, those same agents had information regarding the Walker homicide for which Mr. Spring was eventually interrogated, intended to interrogate Mr. Spring regarding that offense, and could have easily communicated that information to Mr. Spring.

In its brief, the Government argues that the rationale underlying the decision of the Colorado Supreme Court could be extended to require police officers to provide a suspect with all the information possessed by police officers that might be relevant to the calculation of his self-interest. Thus, the Government asserts, police officers would be required to inform a suspect of "the quality and quantity of information already possessed by the police concerning the suspect's involvement in the offense . . . the legal elements of the offense, [and] the likely penalties. . . ." Brief of the United States at 20-21. As discussed above, however, nothing in the Colorado Supreme Court's decision requires police officers to provide additional warnings besides those required by *Miranda* to a defendant. Rather, a defendant's knowledge of the nature of the offense under investigation is simply one factor to be assessed under the totality of the circumstances. The Colorado Supreme Court's decision reflects the concern that unless a suspect has some information about the offense under investigation he may be unable to make a knowing and intelligent decision whether to request an attorney who could counsel the suspect regarding his legal predicament and the advisability of making a statement.

The Colorado Supreme Court assessed the totality of circumstances surrounding Mr. Spring's Miranda waiver. The Court properly considered Mr. Spring's awareness of the nature of the offense as a factor in its assessment. The

Court noted that Mr. Spring was "not advised that he would be questioned about the Colorado homicide," *Spring*, 713 P.2d at 874, and that Spring "had no reason to suspect that the federal agents who had just arrested him in Kansas City during a firearms transaction . . . would question him about a murder . . . in Colorado not only in a distant jurisdiction but outside of the normal purview of the [ATF] . . . and totally unrelated to the transaction that gave rise to the arrest. . . ." *Id.* Moreover, "the federal crime that occasioned the interrogation [and waiver] . . . represented a relatively less serious matter than first degree murder." *Id.* The Court noted that the record offered "little with regard to Mr. Spring's intelligence or acquaintance with the criminal justice system." *Id.* The foregoing reveals a careful and thorough analysis by the Colorado Supreme Court of the totality of the circumstances as is required by this Court's decisions in *Fare* v. *Michael C.*, and *North Carolina* v. *Butler*, and its decision should therefore be affirmed by this Court.

## II. THE COLORADO SUPREME COURT, APPLYING THE *TOTALITY OF THE CIRCUMSTANCES* STANDARD, CORRECTLY CONCLUDED THAT MR. SPRING'S *MIRANDA* WAIVER WAS NOT VOLUNTARY.

In *Miranda*, this Court held that in order for a suspect's statements to be admissible, the prosecution must show that the suspect did in fact "voluntarily waive his privilege." 384 U.S. at 476. This Court thus condemned any waiver obtained under coercive circumstances:

> Whatever the testimony of the authorities as to waiver of rights by an accused, the fact of lengthy interrogation or incommunicado incarceration before a statement is made is strong evidence that an accused did not validly waive his rights. In these



> circumstances the fact that the individual eventually made a statement is consistent with the conclusion that the compelling influence of the interrogation finally forced him to do so. It is inconsistent with any notion of a voluntary relinquishment of the privilege.

*Id.* This Court also held that "any evidence that the accused was threatened, tricked, or cajoled into a waiver will . . . show that the defendant did not voluntarily waive his privilege." *Id.* As with the determination of whether a suspect knowingly and intelligently waived his rights, the voluntariness of a waiver must be assessed by an inquiry into the "totality of the circumstances surrounding the interrogation." *Fare* v. *Michael C.*, 442 U.S. at 725.[13]

In *Miranda*, this Court disapproved of the use of deceptive police practices in obtaining a suspect's confession. This Court condemned interrogation practices by which police offer suspects 'legal excuses', thus suggesting that no crime was involved or perhaps that the suspect's role in the offense was mitigated. 384 U.S. at 451. This Court also condemned a procedure by which a suspect is identified by persons falsely claiming to have witnessed a crime, thus leading the suspect to misjudge the amount of evidence available to convict him. 384 U.S. at 453. This Court's discussion implies that police practices which mis-

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[13] In the recent case of *Moran* v. *Burbine*, this Court reiterated the standards for determining waiver under *Miranda:*

> First the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion or deception. Second, the waiver must have been made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the 'totality of the circumstances' surrounding the interrogation reveals both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived.

106 S.Ct. at 1141.

lead the defendant regarding the seriousness of his legal or factual predicament will vitiate the voluntariness of his *Miranda* waiver and render his subsequent statements inadmissible.[14]

In the instant case, the Colorado Supreme Court concluded that during the March 30th interrogation, ATF agents Sadowski and Patterson "led . . . [Mr. Spring] to believe that he would be questioned about one crime [the federal firearms offense] but then interrogated him about a totally unrelated offense [the Walker homicide]." 713 P.2d at 873. At the time of the March 30th interrogation, Agents Sadowski and Patterson knew that Mr. Spring had confessed his involvement in the Walker homicide to George Dennison. Moreover, the agents had participated in tape recording a conversation between Mr. Spring and Mr. Dennison in which Mr. Spring implicated himself in the murder. The agents thus clearly knew that Mr. Spring had been involved in a much more serious matter than the

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[14] In pre-*Miranda* cases this Court, although avoiding any *per se* rule of inadmissibility, has similarly routinely condemned the use of police trickery and deception in obtaining confessions. Thus in *Lynum* v. *Illinois*, 372 U.S. 528, this Court held that the misrepresentation by police officers that the petitioner could be deprived of state financial aid for her dependent children if she failed to cooperate with police authorities rendered her subsequent statement inadmissible. In *Spano* v. *New York*, 360 U.S. 315, this Court condemned the misrepresentation by a police officer, who was also a friend of the defendant, that he would lose his job if the defendant failed to cooperate. In *Leyra* v. *Denno*, 347 U.S. 556 (1954), this Court held impermissible the use of a police psychiatrist trained in hypnosis to obtain a confession where the psychiatrist was introduced to the defendant as a "doctor" brought to give him medical relief from a painful sinus. *See also Frazier* v. *Cupp*, 394 U.S. 731 (police officer's misrepresentation that the defendant's accomplice had confessed was a relevant factor under the totality of the circumstances in assessing whether the defendant's confession was voluntary).



firearms transaction for which he had just been arrested. The agents then structured their interrogation to obtain incriminating information in such a fashion as to not "tip off" Mr. Spring as to the nature of the offense under investigation. Thus as the Colorado Supreme Court noted, "nothing about the questions concerning the federal firearms crimes or about Spring's past criminal record" or even "whether [Spring] had ever been in Colorado" suggested the true "topic of inquiry." *Spring*, 713 P.2d at 874. This interrogation procedure was clearly intended to mislead Mr. Spring about the nature of the inquiry and his true legal predicament in violation of this Court's decision in *Miranda*. Accordingly, the Colorado Supreme Court concluded that under the measure of the "totality of the circumstances" Mr. Spring's *Miranda* waiver was not voluntary.[15]

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[15] The same deceptive practices employed by ATF agents in their March 30th interrogation were used on July 13, 1979. *See* n.3, *supra*. During this interview ATF agents first informed Mr. Spring that they were questioning him in order to obtain information concerning the whereabouts of additional firearms and explosives. *Spring*, 713 P.2d at 876. The agents then shifted the focus of their interrogation to the Walker homicide. On three occasions Mr. Spring indicated he did not wish to answer questions regarding the murder. On each occasion the agents shifted their questioning to firearms or some other topic including camping out in Iowa before returning to the topic of the homicide. (Supp.Tr. 233-37) Through use of this persistent and improper interrogation technique the agents were able to obtain incriminating information.

A number of lower courts have held that deceptive police tactics similar to that employed by ATF agents on March 30th render a *Miranda* waiver involuntary. *See e.g.*, *People* v. *Groleau*, 44 Ill.App.3d 807, 358 N.E.2d 1192 (1976) (Defendant was told by police that the victim, who was actually dead, was either in the hospital or missing); *Commonwealth* v. *Jackson*, 386 N.E.2d 15 (Mass. 1979) (Defendant falsely told by law enforcement officials that his girlfriend

In its brief the Government contends that this Court's decision in *Moran* v. *Burbine*, 106 S.Ct. 1135, compels the rejection of the Colorado Supreme Court's conclusion that Mr. Spring's *Miranda* waiver was not voluntary. Brief of the United States, at 25. This assertion is incorrect. As discussed above, *see* Respondent's Argument I, in *Moran*, law enforcement officials failed to inform the defendant of a phone call placed by an attorney retained by the defendant's sister. In rejecting Defendant's claim that the actions of the police constituted "trickery" which rendered his *Miranda* waiver involuntary, this Court noted that:

> Granting that the "deliberate or reckless" withholding of information is objectionable as a matter of ethics, such conduct is only relevant to the constitutional validity of a waiver if it deprives a defendant of knowledge essential to his ability to understand the nature of the rights and the consequences of abandoning them.

*Id.*, 106 S.Ct. at 1142. In *Moran*, the defendant was aware of his right to counsel and this Court thus concluded that the failure to inform the defendant of the phone call could have no effect on the defendant's ability to voluntarily waive his rights. By contrast, the police trickery employed in this case impacted on Mr. Spring's ability to intelligently exercise his rights, *see* Respondent's Argument I, and thus constituted deception which vitiated Mr. Spring's *Miranda* waiver.

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confessed to the crime). *See also*, White, *Police Trickery in Inducing Confessions*, 127 U.Pa.L.Rev. 581, 611-614 (1979), Dix, *Mistake, Ignorance, Expectation of Benefit, and the Modern Law of Confessions*, 1975 Wash.U.L.Q. 275, 318-19. (Misrepresentations of the nature of the offense under investigation should render a *Miranda* waiver involuntary).



ATF agents employed deceptive police practices and misled Mr. Spring into waiving his *Miranda* rights on March 30, 1979. The Colorado Supreme Court, assessing the "totality of the circumstances" correctly concluded that Mr. Spring's waiver was not voluntary. That Court's decision, supported by the facts as adduced at the suppression hearing of March 17, 1980, should be affirmed.

## CONCLUSION

The judgment of the Supreme Court of Colorado should be affirmed with respect to the issue on which this Court granted certiorari.

Respectfully submitted,

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